

Partisan Politics and Federal Law Enforcement: The Promise and Corruption of Reconstruction

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Review of Charles Lane, *Freedom's Detective: The Secret Service, the Klux Klan, and the Man Who Masterminded America's First War on Terror* (Hanover Square Press, 2018)

Partisan attacks on federal criminal enforcement agencies, although louder than usual in recent years, are nothing new. Yet the existence and future prospects of these agencies are largely taken for granted. Often forgotten are the contingency of their survival; the delicacy of the balances we demand they strike between political accountability and insulation, between zealousness and respect for the rule of law; and the relationship between what it takes to survive and what is needed to strike the right balance.

The country may be nearing its 250th birthday—and the Constitution, its 235th—but the federal law enforcement project is just not that old. Sure, there were a few federal criminal statutes and U.S. attorneys' offices in 1789 and, soon after, a Bill of Rights to protect federal defendants. But there were not many officers or defendants. During the first half of the 19th century, the focus would be on the federal government's core interests. Deputy marshals might well

haul you into court if you attacked or bribed a federal employee, stole from the mails, or deprived the national government of its desperately needed customs revenue (a fact that made the high-volume U.S. Customs House in New York and the U.S. Attorney's Office for the Southern District of New York of particular importance). Wrongs against individual citizens, however, were of little federal concern—except when the government put its institutions and personnel at the disposal of Southern slaveholders seeking to return “fugitive slaves.” Federal criminal enforcement institutions—outside the limited-mission Postal Inspection Service (to use its modern name)—would remain minimal and bounty driven.

In time this would change. But when and how? Recent accounts of the “federalization” of crime usually start with Congress's forays in the early 20th century—the Mann Act, the Harrison Act, Prohibition and the Dyer Act—and then chart the legislative trot through Franklin

D. Roosevelt's war on crime to the gallop in the 1970s and beyond. Correcting for the overemphasis on legislative enactments in this literature, a spate of deeply researched and wonderfully readable books—including Bryan Burrough's "Public Enemies," Beverly Gage's "The Day Wall Street Exploded" and David Grann's "Killers of the Flower Moon"—has given us a sense of how federal agencies, in particular the FBI, were stood up to enforce these laws.

Yet much as the fascinating particulars of the *real* FBI story—not the narrative of omniscient professionalism carefully cultivated by J. Edgar Hoover and his minions during his nearly 50-year tenure—shed light on how federal enforcement capacity developed, that growth neither started with the bureau nor can be fully understood without considering the history of the Secret Service, which was created to target counterfeiting in 1865. Luckily, Charles Lane's extraordinary book, "Freedom's Detective," not only recounts the Secret Service's early days, but it does so with a flair, skill and deep learning that push the reader to contemplate the fragility of federal enforcement missions in a roiling political landscape, and to appreciate the deep tragedy of the post-Civil War civil rights mission (or perhaps it was a rule of law mission, or a Republican Party-protection mission), which was forcefully pursued for a brief time and then dropped.

The brutal violence of the Reconstruction-era South and the brief period of executive commitment to destroying the impunity of its perpetrators is familiar territory for Lane, a Washington Post editorial page writer who recently wrote a powerful book about the Colfax Massacre in 1873—an

atrocious affair in which white supremacists murdered approximately 150 African Americans in the wake of disputed state elections—and its legal aftermath. In "Freedom's Detective," he finds the perfect vehicle for exploring how the Secret Service was deployed against the Ku Klux Klan, capturing the triumphs, abuses and fragility of this mission in one of the many improvised episodes that marked the growth of the federal criminal apparatus.

The vehicle is Hiram Whitley, whom Lane makes the ostensible protagonist of his book. I say "ostensible" because this is not really the kind of biography that works hard to capture its subject's inner life or personal development. One ought not to blame Lane, however, for the limitations of his sources and the inherent difficulty of illuminating the character of someone committed to working in the shadows and curating a public image. Lane justifiably focuses on Whitley's career. Whitley spearheaded the growth of a federal detective capability and powerfully displayed its highest value—as a tool for dismantling predatory organizations. He was also a flawed human capable of abusing authority in service of institutional and personal goals that were inevitably intertwined during a period of both nation-building and rampant government corruption.

After an ugly 1859 episode in which he treacherously assisted in the kidnapping of alleged "fugitive slaves" in Lawrence, Kansas, Whitley did yeoman service as a spy in 1862-1863 for Union commander Gen. Benjamin Butler. With Butler's help, he secured postwar employment as a revenue agent, going after moonshiners whose commitment to their profitable

trade was supercharged by their contempt for the victorious Union's tax-collection efforts. Quickly establishing himself as a wily and effective revenueur, Whitley was soon seconded in 1868 to help Gen. George Meade—the Gettysburg commander now in charge of the Georgia-Alabama-Florida military district—deal with an upsurge in Ku Klux Klan atrocities calculated to suppress Republican, and particularly African American, participation in the 1868 elections. Assigned to identify and apprehend those responsible for the murder of a leading white Republican in Columbus, Georgia, Whitley neutralized the killers' obstructive efforts by taking full, sometimes quite abusive, advantage of the military regime from which his authority derived. Lane does not shrink from the details of Whitley's tactics, including mock executions and solitary confinements in an isolated fort. The evidence was going in nicely before the military commission when Georgia's ratification of the 14th Amendment—sped along by those specifically intending to abort the trial—satisfied the condition for the state's readmission to the Union and triggered the dissolution of the proceedings. Lane jumps around a little chronologically to put each of these episodes in appropriate context, but his splendid writing and graceful engagement with the archives and scholarly literature make the sequencing easy to follow and hugely satisfying.

The book truly takes off when Whitley's connections and effectiveness lead newly elected President Ulysses S. Grant to appoint him chief of the Secret Service. The Secret Service was created in 1865 with the same sort of unilateral and improvisational executive action that would attend the birth of the FBI in 1908.

Congressional authorization would come later. The integrity of the new federal "greenbacks" needed protection against counterfeiters (increasingly based in Canada), so the Treasury solicitor under President Andrew Johnson put a small, somewhat rickety, crew together. The new Grant administration, far more committed to the nation-building project than the beleaguered Johnson, brought in Whitley to whip the new force into shape. Whitley moved the Secret Service's headquarters to the heart of the domestic counterfeiting industry, lower Manhattan (definitely a good place for a federal agency seeking insulation from Washington), and soon stood up a formidable, albeit small, enforcement bureaucracy of agents and informants. They set about doing what federal agents do best: "flipping" their way up distribution chains, with their ultimate targets the well-heeled, respectable citizens who profited from the crimes of those lower down the food chain.

By 1871, Whitley's men had worked their way up to a rich public works contractor and Tammany Stalwart who was also a major counterfeiter. In this prosecution, one sees the American legal order struggling to reckon with evidence based on infiltration and cooperator testimony—tactics that would come to be seen as inevitable pillars of a prosecution against those who would otherwise have impunity. The defendant, with help from the judge's doubt-raising jury instructions, successfully put the government on trial. Yet Whitley—who was not averse to the florid, direct communication with the public that would make J. Edgar Hoover famous—struck back after the acquittal with a widely republished letter, "To the People," in defense of undercover operations and cooperator credibility. He

also got a friendly journalist to write a book celebrating the Secret Service's effectiveness along with Whitley's own skill and integrity. Having access to the Secret Service's confidential files eased the journalist's work and made the piece punchier, that is, more scurrilous.

Even while deeply engaged in the New York proceedings, Whitley was directing an aggressive war on the Ku Klux Klan in the South using the same infiltration tactics honed against counterfeiters. The year 1870 had brought the creation of the Department of Justice, led by the formidable Amos T. Ackerman—who had briefly soldiered for the Confederates but was now committed to Reconstruction. Recognizing the devastating increase in KKK violence, Ackerman, with full support from Grant, instructed his U.S. attorneys to prosecute every violation of the new anti-Klan laws. Lacking exclusive control of a detective force to commit to this campaign (although U.S. marshals did important work), Ackerman turned to the Secret Service, over which he shared authority with the Treasury Department and which apparently was not particularly restricted in its duties. (Some 38 years later, Congress's effort to bar the Justice Department from borrowing Secret Service operatives would trigger Attorney General Charles Bonaparte's creation of the FBI.)

Lane vividly recounts the damage Whitley and his undercover operatives inflicted on Klan activities—and the considerable help they received from military units, as authorized by the 1870 Civil Rights Act and the 1871 Ku Klux Klan Act. Those charged were also regularly convicted in civilian courts, by juries containing both whites and African Americans. However

uncomfortable one may be about the suspension of habeas corpus (a move Grant made in 1871, using his Ku Klux Klan Act authority, for a number of South Carolina counties beset by Klan violence), it's hard to read Lane's account without a sense of a world that could have been: a federal government committed to, at the very least, ensuring equal citizenship for African Americans in the South and elsewhere. Instead, Supreme Court decisions, the Posse Comitatus Act and simple lack of presidential interest would put an end to criminal federal civil rights enforcement until FDR's attorney general, Frank Murphy, would dip the Justice Department's toes into the area.

I've long treasured the notion that protection of civil rights was encoded in the Justice Department's DNA. Yet civil rights enforcement was so bound up with the interests of the Republican Party in the South (as vote-suppressing atrocities were bound up with those of the southern Democratic Party) that separating righteous motives from partisan ones poses a challenge that Lane moots but does not adjudicate.

Indeed, an alternative motivation might have been simply a commitment to impose the rule of law. Parsing out the "true" reasons for a significant enforcement program will always be difficult, and Lane ought not be faulted for not going further. Still, he carefully details how Whitley used Secret Service operatives to collect political intelligence for the Republican Party during the runup to the 1872 election, and how Whitley was fully complicit in the quick withdrawal of Secret Service personnel from anti-Klan operations after Grant's 1872 reelection. Did Whitley delude himself into thinking

the threat to African Americans from the Klan had ended with the election? Did he care less about their plight after their votes had been cast and see his agency's mission as ending with his party's victory? Was he simply responding to the waning of his political masters' interest in the Reconstruction project? Was he primarily interested in returning his small agency to its anti-counterfeiting mission? Again, I suspect Lane's failure to plumb Whitley's motivations is a function of source limitations, and Lane is careful to suggest that maybe Whitley just wanted to spend more time with his wife and their mothers in Cambridge, Massachusetts.

There's a general truth that transcends the available sources and, indeed, Lane's account: In the absence of strong institutional culture, structural insulation from partisan politics, and external monitoring, federal detective and intelligence agencies—which inevitably lack the clear performance metrics that would make their effectiveness and the value of their mission manifest to all—have a natural tendency to protect themselves by attending to signals from their political masters. Since Watergate, when Hoover refused to accommodate Nixon's machinations, enormous institutional and regulatory work has gone into neutralizing this tendency—work that our current president is desperately, and so far unsuccessfully, trying to undo.

The price a shadowy agency pays for survival when it lacks the assurance of political support for one or more of its missions is but one lesson of Lane's extraordinary and enjoyable book. Another is the near impossibility of purity in a presidential administration filled with

self-dealers. An 1874 scandal occasioned by Whitley's readiness to accommodate the personal projects of his political masters—in this case, concocting a baroque plot targeting critics of Grant's personal secretary Orville Babcock (soon to be of Whiskey Ring infamy)—led some to recommend the Secret Service's elimination. It survived, constrained to focus on counterfeiting (and, later, presidential protection). Today, we've come to think of the Secret Service as having an oddly diverse array of responsibilities: counterfeiting, cybersecurity and dignitary protection. Yet Lane insightfully shows the relationship between the Secret Service's two missions in 1871. A national currency and "equal national citizenship for whites and blacks" were, Lane notes, the Republicans' "two great post-Civil War nation-building projects." The Secret Service was charged with protecting both, until the second mission was abandoned. Whitley did not survive professionally, and Lane tells the fascinating story of what eventually became of him and others in the book.

"Freedom's Detective" also drives home how prosecuting domestic terrorism is more an issue of executive commitment than substantive law. Much can be made of the Supreme Court's gutting of Reconstruction statutes; Congress's later failure to enact an anti-lynching law; or, now, the absence of an explicit domestic terrorism law. Today, as in 1872, however, the important question is not whether the necessary legal framework exists—it assuredly does—but whether an administration is fully committed to identifying and pursuing those who would deprive others of their rights as citizens. Federal enforcers currently seem quite

prepared to prosecute those who perpetrate horrific instances of racially motivated violence. Whether they are ready to use criminal authorities against the structures and networks from which those perpetrators emerge remains to be seen. At a time when many observers debate the federal role in criminal law, Lane captures a moment of promise for a quintessentially federal mission (whatever its motivations). And his page-turning exploration of it is not only an excellent history but also a quiet and inspiring call for us to do better.

Daniel Richman is the Paul J. Kellner Professor, Columbia Law School. Along with legal historian Sarah Seo, Richman is currently writing an article about how FBI established itself within the national policing ecosystem in the 1920s through 1960s.

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